

Fantasy Sports On Tenterhooks For New York Ruling

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FanDuel, DraftKings and other players in the daily fantasy sports (DFS) industry remain on tenterhooks as a New York judge prepares to issue the first key ruling in a case that is likely to resonate in at least ten other states with similar gambling definitions.

New York Supreme Court Judge Manuel Mendez declined after a hearing Wednesday to rule immediately on Attorney General Eric Schneiderman's [bid for an injunction](#) on the two DFS giants, although he said a ruling would come "very soon."

Although Schneiderman has also taken aim at the companies' advertising practices, the central issue is whether DFS contests are a form of gambling under New York law, which includes similar legal definitions to at least ten other states.

In the Empire State, a wager constitutes gambling if it is placed on a "contest of chance" or a "future contingent event" that is not under the "control or influence" of the bettor.

By pushing back against Schneiderman, DraftKings and FanDuel are hoping to extend the [2007 finding of a New Jersey federal court](#) that entry fees to fantasy sports leagues should not be considered bets or wagers at all, with fantasy operators neutral parties in the outcome of contests that are played between players.

Further, the companies argue that customers do fundamentally influence fantasy contests because the outcome depends on the line-ups they have selected.

In terms of whether fantasy sports are considered a contest of chance, New York law defines such contests as any "game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."

Other states that appear to apply a similar "material element" test in their gambling definitions are

Alabama, Alaska, Hawaii, New Jersey, Oklahoma, Oregon, Maryland, Missouri and Washington.

That is different to the definitions of other states where chance must outweigh or predominate over skill for a game to qualify as gambling.

“The ‘material element’ test is a pretty low bar to get to as opposed to the ‘predominance’ test,” said one gaming attorney who requested anonymity.

“There could be a domino effect if the case in New York is successful.”

Still, despite similar gambling definitions, there are divergences in how the so-called material element test has been applied.

In legal filings, FanDuel and DraftKings argue that both legislative intent and New York case law suggests the Empire State actually applies the predominance test itself, a claim Schneiderman has rebutted.

“Other states copied New York’s statute just like we did, but there is not a uniform interpretation by the courts,” Washington State Gambling Commission chairman Chris Stearns told GamblingCompliance.

In Washington, Stearns said the legal status of fantasy sports has been guided by several court cases, including one from 1972 on a Seattle Times football picking game that involved head-to-head contests.

FanDuel and DraftKings have long refused players from Washington, even as they have operated in New York.

“Ultimately, it really means that it is up to the courts of individual states to add clarity,” Stearns said.

With only injunctions at issue for now, a definitive resolution to the New York cases themselves appears unlikely to come for at least several months.

Still, the imminent legal decision of the state Supreme Court comes at a critical juncture for daily fantasy sports.

Beyond New York, attorneys general and **regulators** in a growing cluster of states are also starting to scrutinize the young industry.

Meanwhile, legislative attention is turning to the most effective ways to regulate DFS operations.

It would make sense for other states to take action depending on the outcome in New York, said Robert McLaughlin, head of the gaming practice at law firm Hodgson Russ in Albany.

If legal rulings go against the fantasy companies, “I would expect in the next 30 days that you would have a dozen other states saying that DFS can’t legally operate in their states,” he told

amblingCompliance.

A negative outcome could also conceivably hurt the DFS industry's **recent attempts to advocate for self-regulation**, according to Keith Miller, a law professor at Drake University in Des Moines, Iowa.

"What effect Schneiderman will have on other states is uncertain, but it's certainly not going to give any more traction to the idea that it can be a light-touch regulation," Miller told amblingCompliance.

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